

0017 5069 40 (Sept. 9, 2016) – The claimant voluntarily separated from employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, where the findings and record reflect that he chose to engage in conduct that warranted his incarceration and consequent inability to show up for work for three consecutive days. Thus, he abandoned his job.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member

Issue ID: 0017 5069 40
Claimant ID: 10437795

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his position with the employer on September 18, 2015. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 23, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 8, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant caused his own separation from employment when he did not appear for work for three consecutive days while he was incarcerated is supported by substantial and credible evidence and free from error of law, where the findings reflect that the claimant was incarcerated because he had engaged in several serious motor vehicle violations while under the influence of alcohol.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant began working for the employer, a commercial truck leasing and maintenance provider, in January of 1990.
2. At the time of the claimant's separation, he was working full time as a diesel inspector 1 for forty (40) hours per week at the pay rate of \$32.01 per hour.
3. The claimant worked his full time schedule up through September 4, 2015, after which he went on an approved vacation for the duration of the week ending September 12, 2015.
4. The employer scheduled the claimant to work full regular shifts beginning at their customary time of approximately 6am on September 14, 15, and 16, 2015.
5. On September 12, 2015, the claimant's girlfriend ("Partner") called local police and filed a complaint against the claimant for domestic violence towards herself and her son.
6. Officers responded to the claimant and arrested the claimant that same night, after which they released him in the morning of September 13, 2015 pending a court hearing the following day regarding the Partner's complaint.
7. The claimant then obtained and consumed an unknown quantity of vodka combined with cranberry juice while in his car, including doing so while ingesting prescription medication.
8. The claimant then began driving his car, during which time he swerved repeatedly across the road and caused other police officers on the road to attempt to pull him over.
9. The claimant did not stop when officers first attempted to pull him over, but instead began speeding to get away from them before losing control of his vehicle and crashing.
10. Police officers removed the claimant from his vehicle and administered a breath test for alcohol on the claimant.
11. The breath test showed the claimant's blood alcohol level as being .11, over the legal limit to drive of .08.
12. The officers then transferred the claimant to the custody of the Massachusetts state police, who booked and processed him.
13. The state police then brought the claimant to court where he was arraigned on charges of operating under the influence ("OUI") of alcohol, reckless driving, and other charges with bail set at \$55,000.

14. The claimant could not afford bail and remained in jail, after which he called his sister (“Sister”) to tell her what had happened to him and that he was being held.
15. The claimant did not tell the Sister to call the employer regarding his whereabouts.
16. On September 14, the claimant’s supervisor (“Supervisor”) attempted to call the claimant but instead reached the Partner, who informed him that the claimant had started consuming illegal drugs and alcohol after her domestic violence complaint against him and that the claimant was then ultimately arrested on September 13, 2015, was currently in jail and would be going forward.
17. The claimant did not report to work at any time on September 14, 15, or 16, 2015 or thereafter as he remained incarcerated.
18. Continuing work was available to the claimant at the time he no longer appeared for work starting September 14.
19. The employer did not hear from the claimant at any time on September 14, 15, or 16 regarding if or when he was coming to work, after which they deemed him to have abandoned his job as of September 18, 2015, when he still had not appeared or called.
20. The claimant contacted the employer’s human resources manager (“Manager”) by phone from jail in November 2015, at which time the Manager informed him of the separation having been processed and that the claimant no longer had work available to him from the employer.
21. The claimant made bail and was released from jail on December 2, 2015, but has not returned to work for the employer at any time after being formally separated on September 18, 2015.
22. As of March 1, 2016, all charges against the claimant remain pending and no final judgments have been reached or rendered.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner’s ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner’s findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we concur in the review examiner’s conclusion that the claimant is not eligible for benefits.

We have recently reaffirmed the agency's longstanding approach to cases like this, in which a claimant becomes separated from his job for failing to show up for work while he is incarcerated. In Board of Review Decision 0015 9093 69 (August 26, 2016), after discussing and applying prior court and agency decisions, the Board reaffirmed that such cases are appropriately analyzed in terms of job abandonment and therefore as quit cases, governed by G.L. c. 151A, §§ 25(e) and (e)(1), rather than as discharges that would be governed by G.L. c. 151A, § 25(e)(2).¹ G.L. c. 151A, §§ 25(e) and (e)(1) provide in pertinent part as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] ... (e) For the period of unemployment next ensuing ... after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent ... [or] if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The Massachusetts Supreme Judicial Court ("SJC") has noted that the word "voluntarily," as used in the above provision, is a term of art that must be read in light of the statutory purpose of providing "compensation for those who are thrown out of work through no fault of their own." Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985) (rescript opinion) (employee deemed to have quit voluntarily when he lost his driver's license through his own fault and as a result could not get to work). If an employee's inability to get to work is outside of his control, he may be eligible for benefits under the portion of the above provision that allows benefits where an employee has left his job for urgent, compelling, and necessitous reasons. Even in the latter situation, the claimant may be denied benefits if he does not show that he made efforts to preserve his employment or that efforts would have been futile. Norfolk County Retirement System v. Dir. of Division of Employment Security, 66 Mass. App. Ct. 759, 766 (2009).

Applying these concepts to cases where the claimant cannot report to work because he has been incarcerated, the claimant will be eligible for benefits if the record lacks substantial and credible evidence that the claimant engaged in the behaviors for which he was incarcerated. *See, e.g.*, Board of Review Decision 0015 9093 69, referred to above, where the claimant denied engaging in the alleged criminal activity, the charges were eventually dismissed, and the record lacked any other evidence suggesting the claimant's responsibility for the incarceration that prevented him from attending work. In that situation, the Board inferred from the evidence in its totality "that the claimant's arrest and incarceration were beyond his control." *Id.* at 5. Since the claimant in that case had also taken steps to preserve his employment, by having his mother telephone the employer in a timely fashion and request a leave of absence, the claimant was allowed benefits upon his release from jail. *See also* Board of Review Decision 0002 3706 54 (February 4, 2014) (claimant entitled to benefits where his incarceration resulted from arrest on a false charge). By the same token, a claimant whose incarceration occurred as a result of deliberate decisions made by the claimant, as reflected in the findings of fact and supported by substantial and credible

¹ Board of Review Decision 0015 9093 69 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

evidence, will be denied benefits because his separation from employment was “voluntary” within the meaning of *Olmeda, supra*. See, e.g., BR-81022-A (February 27, 2001), where the claimant was denied benefits because his incarceration resulted from his conscious decision not to appear in court, which in turn led to a warrant for his arrest and detention.²

The claimant’s situation clearly falls within the category in which his incarceration resulted from his own decision to engage in the behaviors that warranted his incarceration. The findings of fact reflect that the claimant was initially arrested on September 12, 2015, based upon allegations of domestic abuse, but, after being jailed overnight, he was released the next morning, a Sunday, on which he was not scheduled to work. Although the claimant was scheduled to be in court on Monday regarding these charges, he did not in fact miss work because of these charges, nor do the findings or the record indicate that the claimant in fact engaged in the alleged criminal behaviors as to these first charges. Upon being released, however, the claimant decided not to go home, but instead to obtain and consume alcohol, along with some prescription medications, while in his car. The findings reflect that the claimant thereafter began driving his car, swerving repeatedly across the road, attempting to evade the police officers who tried to stop him, and eventually crashing his vehicle. His blood alcohol content registered as .11, well over the legal limit to drive. The underlying record amply supports these findings, which the claimant does not deny, although he contends he does not remember anything after ingesting the alcohol and medications in the passenger seat of his car. After his arrest on the charges related to the driving incidents, the claimant remained incarcerated for several weeks. After three days, his employer deemed him to have abandoned his job and severed his employment.³ Under the Board’s longstanding approach to cases of this nature, the claimant must be held to have quit his job voluntarily, because he chose to engage in conduct that warranted his incarceration and his consequent inability to report for work.

We, therefore, conclude as a matter of law that the claimant voluntarily separated from his employment, within the meaning of G.L. c. 151A, § 25(e)(1), when he chose to engage in conduct that warranted his incarceration and his consequent inability to report for work.

² Board of Review Decisions 0002 3706 54 and BR-81022-A are also unpublished decisions.

³ We note that the findings and the record are somewhat ambiguous about whether the claimant took timely steps to inform the employer about his incarceration. Whether or not he made reasonable efforts to preserve his employment, however, he is not eligible for benefits. He was at fault for his own inability to report for work and, therefore, did not leave work involuntarily, “for urgent, compelling and necessitous” reasons, within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 19, 2015 and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 9, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

JN/rh